(2)

No. 91-410

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARDOLFO MUNOZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DAYTON M. CRAMER
Col., JAGC, USA

DANIEL J. DELL'ORTO
Lt. Col., JAGC, USA

THOMAS E. BOOTH
Maj., JAGC, USAR

GREGORY T. BALDWIN
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013

QUESTION PRESENTED

Whether the trial judge abused his discretion by admitting evidence of petitioner's prior uncharged sexual offenses under Mil. R. Evid. 404(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-410

ARDOLFO MUNOZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-20a, is reported at 32 M.J. 359. The opinion of the court of military review, Pet. App. 21a-22a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 14, 1991. The petition for a writ of certiorari was filed on September 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Monmouth, New Jersey. He was convicted of four speci-

fications of committing indecent acts with a minor child, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to a bad conduct discharge, confinement for three years, and forfeiture of $300 pay per month for 36 months. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 21a-22a. Upon discretionary review, the Court of Military Appeals affirmed. Pet. App. 1a-20a.

1. The evidence at trial showed that on four separate occasions between January 1987 and June 1988, petitioner committed indecent acts with Annette, his minor daughter, by fondling her and touching her breasts or her vagina. Annette was the government's primary witness against petitioner. Petitioner testified in his own behalf and denied that he committed the charged offenses. Pet. App. 2a.

Prior to trial, petitioner moved to bar any evidence that he had sexually molested his two daughters, Isabel and Alberta. The prosecutor opposed the motion. He argued that the uncharged offenses were similar to the charged offenses in that it was petitioner's method to become intoxicated, approach one of his daughters while she was alone in a bedroom or the living room, and fondle her by rubbing her breasts or her vagina. Afterwards, petitioner would tell his daughter, "[t]his is our secret. Don't tell anybody about that." The prosecutor also stated that petitioner had actually sodomized Isabel and Alberta on various occasions, but because of the prejudicial impact of those crimes, he would not seek to admit evidence of them at trial. Pet. App. 3a-4a.

Based on the proffer, the trial judge ruled that he would admit the evidence of petitioner's sexual moles-

tation of his other daughters. He emphasized that the uncharged offenses were very similar to the charged offenses. In each case, petitioner fondled the breasts or vagina of his daughters at his home after he had been drinking, other persons were present, and the offenses occurred when his children were very young. Pet. App. 4a-5a.

During the trial, Annette testified that petitioner had repeatedly sexually molested her. After her testimony, petitioner renewed his objection to the admission of the evidence that he had molested his other daughters. With the panel members absent, Alberta and Isabel testified that petitioner had sexually molested them while they were children. The trial judge then ruled that evidence of petitioner's sexual molestation of Isabel would be admitted, but that Alberta's testimony would be excluded, since she had mentioned a single act of sexual molestation. Pet. App. 5a.

Isabel, who was 24 years old at the time of trial, testified that when she was between 9 and 11 years old petitioner had occasionally approached her at their home and fondled her vagina. On other occasions, she said, petitioner had had oral and anal sex with her. Most of the time, she testified, petitioner had been drinking before he initiated sexual activity. Petitioner did not object to Isabel's testimony concerning the sodomy, despite the prosecutor's earlier assertion that he would not present evidence of petitioner's uncharged sodomy offenses. Pet. App. 6a-8a. Afterwards, the trial judge instructed the court-martial panel members that they could consider petitioner's sexual activity with Isabel only "to prove a plan or design of [petitioner] to sexually molest his own children," and not to show that he was "a bad person or has criminal tendencies and he, therefore, committed the offenses as charged." *Id.* at 12a.

2. The Army Court of Military Review affirmed petitioner's conviction in a brief per curiam opinion. Pet. App. 21a-22a.

3. The Court of Military Appeals affirmed by a divided vote. Pet. App. 1a-20a. The court rejected petitioner's contention that the admission of his history of molesting Isabel violated Mil. R. Evid. 404(b). The court concluded that in light of the similarity between the charged offenses and petitioner's conduct toward Isabel, the trial judge did not abuse his discretion by admitting the challenged evidence. The court also concluded that the fact that the uncharged offenses had occurred about 12 years before the charged offenses did not change the analysis, because the critical concern was each child's age at the time of petitioner's conduct, not the period between the charged and uncharged offenses. The court of appeals also held that the admission of petitioner's uncharged acts of sodomy did not constitute reversible error, for several reasons. First, the court noted that petitioner did not specifically object to that evidence when it was admitted at trial through Isabel's testimony. Second, the court found the evidence to be "clearly superfluous" in light of the admission of the uncharged evidence of fondling. Third, the court pointed out that the trial judge had given a limiting instruction with respect to all of the "extrinsic act" evidence in the case. For those reasons, the court concluded that the admission of the evidence of acts of sodomy with Isabel was harmless error. Pet. App. 11a-12a.

Judge Cox concurred. In his view, the evidence of petitioner's uncharged sexual crimes was properly admitted because evidence of such conduct is powerful circumstantial evidence that corroborates the testimony of the victim. Pet. App. 13a-14a.

Judge Everett dissented. He reasoned that the 15-year-old uncharged sexual crimes were too remote to prove a common scheme or plan. In addition, he concluded that the similarities between petitioner's uncharged offenses and the charged offenses merely showed petitioner's propensity to commit sexual offenses against his daughters, not a plan to do so. Pet. App. 16a-17a. Finally, he would have found that petitioner had properly preserved his challenge to the admission of the uncharged sodomy crimes by objecting to all evidence of his uncharged offenses prior to trial. *Id.* at 19a-20a.

ARGUMENT

Petitioner contends that the trial judge erred by admitting the evidence of his sexual molestation and sodomy of his daughter Isabel.

1. Rule 404(b), Mil. R. Evid., like its federal counterpart, Fed. R. Evid. 404(b), provides that evidence of a defendant's other crimes is not admissible to prove that he is guilty because he has a bad character, but is admissible if it is relevant for other purposes, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a prosecution for a sexual offense, evidence that the accused committed a factually similar sex offense against another victim may be admissible to show the defendant's intent, modus operandi, or plan, or for any legitimate reason other than simply to show that the defendant has a bad character. See, *e.g.*, *United States* v. *Hadley*, 918 F.2d 848, 851-852 (9th Cir. 1990); *United States* v. *Beahm*, 664 F.2d 414, 416-417 (4th Cir. 1981); *United States* v. *Gano*, 560 F.2d 990, 993 (10th Cir. 1977); *Pendleton* v. *Commonwealth*, 685 S.W.2d 549,

552 (Ky. 1985). The remoteness of the uncharged sex crime is a factor in determining its admissibility, but if the prior crime is very similar to the charged offense, evidence of the uncharged offense is admissible. See, *e.g.*, *United States* v. *Hadley*, 918 F.2d at 851 (10 years); *United States* v. *Cuch*, 842 F.2d 1173, 1178 (10th Cir. 1988) (more than 7 years); *United States* v. *Beahm*, 664 F.2d at 416 (within 3 years).

The trial judge in this case did not abuse his discretion by admitting the evidence of petitioner's sexual molestation of his daughter Isabel. The uncharged offenses were strikingly similar to the charged offenses: Petitioner's victims were his daughters; his daughters were about the same age when they were molested; the offenses occurred at petitioner's home; and petitioner usually fondled his daughters after he had been drinking. Because of those similarities, the uncharged offenses were probative because they demonstrated petitioner's modus operandi or pattern of behavior in sexually molesting his daughters. To be sure, the uncharged offenses were between 13 and 15 years old. But that fact was not enough to render the uncharged acts irrelevant, in light of their similarity to the charged acts. Furthermore, the trial judge specifically instructed the members that it could consider the uncharged misconduct evidence only as it related to petitioner's plan or design to molest his minor daughters, and not to show that he had a bad character or general propensities toward crime. See *Huddleston* v. *United States*, 485 U.S. 681, 691-692 (1988).*

---

* The admission of the uncharged sodomy crimes also was not reversible error. As the court noted, petitioner did not

2. Contrary to petitioner's claim, the decision below does not conflict with the Eighth Circuit's decision in *United States* v. *Fawbush*, 900 F.2d 150 (1990). There, the accused was charged with molesting two children while he was their babysitter. At his trial, the district court admitted evidence that several years earlier, the accused had sexually molested his own daughters and had impregnated one of them. The Eighth Circuit reversed, holding that that evidence was improperly admitted under Fed. R. Evid. 404(b). The court reasoned that the evidence was inadmissible because "[t]he daughters' description of Fawbush's sexual abuse did not show a unique method also present in the charged offenses that tended to establish Fawbush as the perpetrator." 900 F.2d at 151. The court also stated that the other crimes were "unrelated to, and * * * occurred eight or more years before, the conduct charged." *Id.* at 152. Here, by contrast, the uncharged crimes were directly related to the charged offenses due to the striking similarities between them. *Fawbush* is therefore factually distinguishable from this case.

Petitioner also claims that the state courts are in disarray over the question whether uncharged sexual crimes may be admitted under a special category of uncharged crimes evidence. Pet. 12-13. Disagreement among the state courts over evidentiary matters, however, does not call for review by this Court. State courts are free to develop their own rules of evidence, including rules regarding the admissibility of prior uncharged crimes. *Lisenba* v. *California*, 314

---

object at trial to Isabel's testimony on that point, which reflects that the main impact of her testimony was the corroboration that it provided for Annette's testimony by the similarity in the acts of molestation directed at the two daughters. Pet. App. 12a.

U.S. 219, 228 (1941) ("We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence."). See *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Burgett* v. *Texas*, 389 U.S. 109, 113-114 (1967); *Spencer* v. *Texas*, 385 U.S. 554, 564 (1967). Moreover, the court of appeals did not hold that there should be a special exception for sexual crimes to the general prohibition on the admission of bad character evidence, the point on which petitioner asserts the state courts are in conflict. Judge Cox commented favorably on that rationale, Pet. App. 13a-14a, but his opinion was not the opinion for the court. This case therefore provides no occasion to decide whether there should be a special exception to Rule 404(b) for sexual offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAYTON M. CRAMER
Col., JAGC, USA

DANIEL J. DELL'ORTO
Lt. Col., JAGC, USA

THOMAS E. BOOTH
Maj., JAGC, USAR

GREGORY T. BALDWIN
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

OCTOBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45129